

State of Minnesota
Minnesota Pollution Control Agency
MPCA Rebuttal Response to Public Comments
March 24, 2017

This document supplements information in the Statement of Need and Reasonableness (SONAR; Hearing Exhibit D) and the March 17, 2017, MPCA Post-Hearing Response to Public Comments in the matter of proposed revisions of Minnesota Rules, chapters 7050 and 7052, relating to Tiered Aquatic Life Uses (TALU) and modification of Class 2 beneficial use designations.

This document contains the Minnesota Pollution Control Agency’s (MPCA or Agency) detailed responses to public comments submitted during the post-hearing comment period (February 16, 2017 through March 17, 2017). As provided for in [Minn. R. § 1400.2230](#), a rebuttal period allows the Agency to review submissions made during the post-hearing comment period and respond to new information submitted. Four comment letters were received from the public by the Office of Administrative Hearings (OAH) during the post-hearing comment period.

The Agency thoroughly reviewed all comments submitted during the post-hearing comment period and identified new topics that were not raised during the pre-hearing comment period (December 19, 2016 through February 2, 2017) or at the public hearing on February 16, 2017. Detailed responses are only provided in this rebuttal for new topics raised in the post-hearing comment period. This review revealed new comments on multiple topics, which are addressed in detail in this document.

Some topics in these post-hearing comment letters were also raised during the pre-hearing comment period and at the public hearing. For convenience, in this document the MPCA provides a brief summary of comments that were not new and which were previously addressed by the MPCA. For those comments, the MPCA provides the location where the Agency previously responded to those comments in the Agency’s response in Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments.

All comments provided to the MPCA have been posted in their entirety on the MPCA TALU webpage at: <https://www.pca.state.mn.us/water/tiered-aquatic-life-uses-talu-framework>.

The comment topics specifically addressed in this document are:

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A. Comments supporting adoption of the proposed amendments, TALU framework, or concepts underlying the TALU framework

Summary of comments:

The MPCA received comments in the post-hearing comment period supporting the use of biological tools and the proposed Exceptional Use. [Minnesota Conservation and Civic Groups]

MPCA response:

The comments received in the post-hearing comment period were not substantially different from comments received during the pre-hearing comment period (December 19, 2016 through February 2, 2017) or at the hearing held on February 16, 2017. A response to these comments can be found in Item A of Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on page 2.

B. Comments related to application of IBI models, biological criteria, and UAA tools

Summary of comments:

The MPCA received comments in the post-hearing comment period regarding the documentation of the biological methods. [Minnesota Conservation and Civic Groups]

MPCA response:

The comments received in the post-hearing comment period were not substantially different from comments received during the pre-hearing comment period (December 19, 2016 through February 2, 2017) or at the hearing held on February 16, 2017. A response to these comments can be found in Item G of Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on pages 18 through 28.

C. Comments related to the proposed Modified Use provisions

Summary of comments:

The MPCA received comments in the post-hearing comment period regarding the development and implementation of the Modified Use [Minnesota Conservation and Civic Groups, Markus, White Iron Chain of Lakes Association].

MPCA response:

The comments received in the post-hearing comment period were not substantially different from comments received during the pre-hearing comment period (December 19, 2016 through February 2, 2017) or at the hearing held on February 16, 2017. Responses to these comments can be found in Item H of Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on pages 28 through 36.

D. Comments related to the proposed UAA process for designating Exceptional Uses

Relates to:

7050.0222, Subp. 2c. (Beneficial use definitions for cold water stream and river habitats (Class 2A));
7050.0222, Subp. 2d (Biological criteria for cold water stream and river habitats (Class 2A));
7050.0222, Subp. 3c (Beneficial use definitions for warm or cool water stream and river habitats (Class 2Bd));
7050.0222, Subp. 3d (Biological criteria for warm or cool water stream and river habitats (Class 2Bd));
7050.0222, Subp. 4c (Beneficial use definitions for warm or cool water stream and river habitats (Class 2B));
7050.0222, Subp. 4d (Biological criteria for warm or cool water stream and river habitats (Class 2B)).

Hearing Exhibit D (SONAR) discussion at:

Section 1.A., Summary of proposed amendments, pages 14-15;
Section 2.D.v., Implementation of TALU, pages 28-31;
Section 5.A.ii., Incorporating numeric biological criteria directly into rule, pages 39-45;
Section 5.A.ii., Protecting high quality waters, pages 45-46;
Section 5. B., Proposed changes and specific reasonableness:
 7050.0222, Subps. 2c, 3c, and 4c, page 59;
 7050.0222, Subps. 2d, 3d, and 4d, page 59;
Other relevant documents: Exhibits S-11, S-63, S-84, S-85, and S-87; Hearing Exhibit L.6; Attachment 7.

Summary of comments:

The MPCA received comments in the post-hearing comment period indicating that the designation of Exceptional Use waters should by default apply to broad categories of waters such as streams in the Boundary Waters Canoe Area Wilderness (BWCAW). [Minnesota Conservation and Civic Groups, White Iron Chain of Lakes Association] One commenter also expressed concerns that TALU designations would lower protections for high-quality waters. [White Iron Chain of Lakes Association]

MPCA response:

The comments received in the post-hearing comment period related to applying by default the Exceptional Use to certain categories of streams was not substantially different from comments received during the pre-hearing comment period (December 19, 2016 through February 2, 2017) or at the hearing held on February 16, 2017. Responses to these comments can be found in Item J (Comment #2) of Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on page 40.

One commenter expressed concern that the proposed TALU framework would result in the lowering of protections for streams in the BWCAW. This concern appears to be based on a misinterpretation of the proposed TALU rule and of the antidegradation rules. The specific concern raised by the commenter confuses the TALU classification of an Exceptional Use with designations that are not related to TALU, specifically "prohibited outstanding resource value waters" in the antidegradation water quality standards at [Minn. R. § 7050.0335 subp. 3.A¹](#), which include all waters in the BWCAW. Prohibited outstanding resource value waters in the antidegradation rule are not the same as the Exceptional Use TALU designation, nor do the categories serve the same purpose.

¹ The commenter makes reference to non-degradation standards in Minn. R. § 7050.0180. These rules were recently repealed and replaced with updated antidegradation standards in [Minn. R. § 7050.0250](#) through [Minn. R. § 7050.0270](#) and [Minn. R. § 7050.0335](#).

The proposed TALU rule amendments do not automatically lower protections for any waters in the state. All streams in the state that are not designated as Class 7 waters (i.e., Limited resource value waters) are currently designated a use that is equivalent, both in theory and practice, to the proposed TALU General Use (Hearing Exhibit D, SONAR [pp. 14-15, footnote 5]). This means that the adoption of the TALU rule amendments does not automatically change any designated beneficial uses, including streams in the White Iron Chain of Lakes or BWCAW. Changes to the designated beneficial use of any water of the state occurs only through a rulemaking where it is demonstrated that the default General Use is not appropriate (Hearing Exhibit D, SONAR [pp. 15, 29]). This rulemaking requirement applies as equally to changes from the General Use to a Modified Use designation as it does to changes from the General Use to an Exceptional Use designation.

The TALU rule amendments do not affect any non-Class 2 designations (e.g., Class 1) nor their protections (Hearing Exhibit D, SONAR [p. 15]). This means that waters protected for domestic consumption (i.e., Class 1) would still be designated as such and the standards that protect this beneficial use would be unchanged. Also, the TALU rule amendments do not change beneficial use designations for any non-flowing waters (e.g., lakes and wetlands; Hearing Exhibit D, SONAR [pp. 14-15]).

Finally, the TALU rule amendments do not change the procedures for implementing antidegradation reviews ([Minn. R. § 7050.0250](#) through [Minn. R. § 7050.0270](#), [Minn. R. § 7050.0335](#)). The commenter indicated that waters in the BWCAW are currently designated as "Exceptional Use" through antidegradation provisions. This is not the case and conflates the proposed Exceptional Use with Outstanding Resource Value Waters. Since the two provisions in rule are separate, the antidegradation provisions continue regardless of the TALU rule amendments; therefore, the TALU rule amendments do not change the antidegradation procedures for protecting waters in the White Iron Chain of Lakes or for any waters in Minnesota. Furthermore, the TALU rule amendments and designations cannot and do not violate antidegradation provisions. Rather, the TALU framework complements antidegradation and can provide additional protections to high-quality waters that are not currently provided by antidegradation (Hearing Exhibit D, SONAR [pp. 45-46]).

E. Comments related to economic analysis, cost of compliance, and cost of implementation

Relates to:

7050.0222, Subp. 2c. (Beneficial use definitions for cold water stream and river habitats (Class 2A));
7050.0222, Subp. 2d (Biological criteria for cold water stream and river habitats (Class 2A));
7050.0222, Subp. 3c (Beneficial use definitions for warm or cool water stream and river habitats (Class 2Bd));
7050.0222, Subp. 3d (Biological criteria for warm or cool water stream and river habitats (Class 2Bd));
7050.0222, Subp. 4c (Beneficial use definitions for warm or cool water stream and river habitats (Class 2B));
7050.0222, Subp. 4d (Biological criteria for warm or cool water stream and river habitats (Class 2B)).

Hearing Exhibit D (SONAR) discussion at:

Section 4., Statutory authority, pages 37-39;
Section 5.A.iii., Setting goals for streams affected by human-induced legacy habitat alterations, pages 46-48;

Section 5. B., Proposed changes and specific reasonableness:

7050.0222, Subps. 2c, 3c, and 4c, page 59;

7050.0222, Subps. 2d, 3d, and 4d, page 59;

Section 6.A.i, Description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule, pages 62-63;

Section 6.A.ii, The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rules and any anticipated effect on state revenues, pages 63-64;

Section 6.A.vi, The probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals, page 66;

Section 6.C., Minn. Stat. 14.127, subds. 1 and 2, Cost of complying for small business or city, pages 71-73;

Section 7.A., Required Notice, page 80;

Section 8, Consideration of economic factors, pages 82-90;

Other relevant documents: Exhibit S-27; Hearing Exhibit K.3.

Summary of comments:

A commenter expressed concern about the sufficiency and accuracy of the MPCA's economic and cost analyses related to municipal separate storm sewer systems (MS4). [Minnesota Cities Stormwater Coalition]

MPCA response:

The comment received in the post-hearing comment period was largely addressed in Item K (Comment #4) of Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on pages 42 through 43. That response addressed comments made during the Public Hearing on February 16, 2017. [Neprash]

In the post-hearing comment period, the commenter specifically asked that inaccuracies on page 73 of Hearing Exhibit D (SONAR) be addressed. As described in Hearing Exhibit D (SONAR) on page 73, the protection of Exceptional Use waters will be through existing mechanisms (e.g., Watershed Restoration and Protection Strategies [WRAPS]) and will not require the adoption of additional ordinances or regulations by local governments. As a result, there will not be the need for MS4 cities to adopt additional ordinances or regulations. Therefore, there is no inaccuracy related to this topic on page 73 of the SONAR.

The commenter also requested that inaccuracies on pages 84 and 85 in Hearing Exhibit D (SONAR) be corrected. In the March 17, 2017, MPCA Post-Hearing Response to Public Comments, Attachment 10 and under Item K (Comment #4) of Attachment 2 on pages 42 through 43, the MPCA described corrections to page 85 which also addressed inaccuracies on page 84. These corrections made clear that the analyses provided in Hearing Exhibit D (SONAR) were incorrect and were related to individual stormwater NPDES permits and did not address MS4 permits. The MPCA provided an analysis specific to MS4 permits on pages 42 through 43 of Attachment 2 to the March 17, 2017, MPCA Post-Hearing Response to Public Comments. From this analysis, it was determined that there would be no impact from the 29 proposed Exceptional Use waters in the TALU rule amendments to MS4 permits. Therefore, the overall conclusion of the analysis in the "Consideration of economic factors" (Section 8, pp. 82-90) in Hearing Exhibit D (SONAR) remains accurate.

The MPCA also clarified in Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on pages 42 through 43, that only four MS4s were within one mile of potential Exceptional Use streams (i.e., streams that were not proposed as Exceptional Use as part of this rule, but could in the future based on available biological monitoring data). These four MS4s and the three related potential Exceptional Use streams are:

- Duluth Township MS4 - Captain Jacobson Creek (04010102-584)
- Duluth City MS4 - Amity Creek (04010102-541)
- St Louis County MS4 - Amity Creek (04010102-541)
- Rice Lake Township MS4 - Unnamed creek (Lester River Tributary) (04010102-539)

The three potential Exceptional Use streams are all Class 2A (i.e., coldwater/trout water) streams. This means that they already have existing additional protections that are likely to be sufficient to protect an Exceptional Use. Although a future proposal to designate these three streams as Exceptional Use is unlikely to impact MS4s, the MPCA provided an overview of the process for determining and preventing the loss of a threatened Exceptional Use within the boundaries of a hypothetical MS4 municipality in Attachment 2 of the March 17, 2017, MPCA Responses to Public Comments on pages 42 through 43.

It also needs to be noted that all of these potential Exceptional Use streams are based on preliminary information and they have not gone through a full TALU review internally at the MPCA, through public review, or through rulemaking to designate any of these streams as Exceptional Use. The TALU rule amendments do not include these three potential Exceptional Use streams, so this rule does not directly impact these permittees. As described in Hearing Exhibit D (SONAR) on pages 85 through 86, if these streams or any other streams are proposed to be designated as Exceptional Use through a future rulemaking, an economic analysis will be required that will provide cost estimates for protecting these waters. As required by [Minn. Stat. § 115.44, subd. 7](#), the MPCA must mail the public notice at least 33 days before the end of the comment period to every municipality (which includes townships and counties) for a rulemaking related to a beneficial use classification change, or other water quality standard change, if that change affects a water that flows through or borders that municipality. For example, as described in Hearing Exhibit D (SONAR) on page 80, and in Hearing Exhibit K-3, the MPCA mailed the public notice for the proposed TALU rule amendments to all municipalities (approximately 1,775 townships, over 850 cities, and 87 counties) in the state because the proposed rule affects waters that flow through or border all municipalities in the state. Therefore, MS4 municipalities will be notified of any future rulemaking that includes streams proposed to be reclassified as Exceptional Use, and the MS4 municipalities will have an opportunity to comment on the proposed designation.

F. Comments related to public participation

Summary of comments:

The MPCA received comments in the post-hearing comment period regarding public participation in general and the sufficiency of the public notice. [Minnesota Conservation and Civic Groups, White Iron Chain of Lakes Association]

MPCA response:

The comments received in the post-hearing comment period were not substantially different from comments received during the pre-hearing comment period (December 19, 2016 through February 2, 2017) or at the hearing held on February 16, 2017. Responses to these comments can be found in Item L of Attachment 2 of the March 17, 2017, MPCA Post-Hearing Response to Public Comments on pages 43 through 46.